U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 07Jun2001

CASE NO.: 2000-LHC-2453

OWCP NO.: 03-27384

In the Matter of:

JOSEPH T. ZDUNSKI
Claimant

v.

ORION CONSTRUCTION, INC.
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
Carrier

APPEARANCES:

Richard Filippi, Esquire
For the Claimant

Francis Womack, Esquire
For the Employer and Carrier

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM FOR LACK OF JURISDICTION

The above-captioned claim arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act" or "LHWCA"), and the implementing regulations. The claim is brought by Joseph T. Zdunski (hereinafter

"Claimant") against Orion Construction (hereinafter "Employer") and Signal Mutual Indemnity Association, Ltd. (hereinafter "Carrier").

Claimant filed this claim on December 10, 1999. Employer filed a Notice of Controversion on December 10, 1999. Claimant seeks temporary total disability benefits from December 2,1999 to July 24, 1999. Additionally, claimant seeks temporary partial disability benefits from July 25, 2000 until such time as claimant is able to return to employment earning his pre-injury wages. On June 5, 2000, the Director, Office of Workers' Compensation Programs (hereinafter "OWCP"), referred this claim to the Office of Administrative Law Judges for a formal hearing.

A hearing was conducted in Erie, Pennsylvania on December 13, 2000 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing Claimant's Exhibits Nos. 1 through 11, Employer's Exhibits Nos. 1 through 17, and Administrative Law Judge's Exhibit No. 1 were received in evidence.[1] Additionally, claimant submitted a MRI report, dated December 27, 2000 and miscellaneous medical bills of various dates post-hearing. These exhibits have been marked CX 12 and 13, respectively. Employer submitted the deposition of Dr. Cooper post-hearing, which has been marked as EX 18. All of this evidence has been made part of the record.

Findings of Fact and Conclusions of Law

Claimant began working for Employer in May or June of 1999. (TR 14). The injury occurred on August 16, 1999 while Claimant was working in the course of his employment at a copper dam. (TR 4 & 19). Employer had a contract with the city of Erie to place a sewer line under the water in Lake Erie. Claimant had been hired for the duration of the project to install the sewer lines. (TR 45). Claimant, at the time of the hearing, testified that since becoming employed by Orion Construction, Inc., the named employer, he has held three positions: deckhand, tender, and diver tender.

Claimant testified as to how the operation to place the sewer line was conducted. The work originated from a barge that was anchored in Lake Erie. The barge would be towed out into the lake with a tug boat. (TR 50). The barge would remain stationary, weather permitting. (TR 50). Claimant and other employees would be transported to the barge by a small boat. (TR 19).

As a deckhand, claimant "dressed the pipes." (TR 14). The pipes were used to start the sewer lines for the city of Erie. Claimant stated that in this position, he would load boxes and lower them to the diver who was placing the lines. The boxes were loaded with concrete block that was used to secure the pipes so that the pipes would not sink to the bottom of the lake. Approximately one month after beginning employment with Employer, Claimant was promoted to the position of diver

[1] The following abbreviations have been used in this opinion: EX = Employer's exhibits; CX = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

tender. (TR 17).

As a tender, he would dress the divers, lower block to the divers, clean out the wetsuits, cover the chamber in the water, dress down into the chamber, and run the chamber for the diver. (TR 51). Claimant explained that in his position as a diver tender, he would oversee deck operations. Claimant would "dive in and out of the diver [and] help dress the divers." (TR 17). Claimant would also, if Employer was shorthanded, help with loading the blocks into the boat and lower the blocks down to the divers. (TR 17). Claimant stated that he would be required to lift the blocks on a daily basis at a rate of 16 blocks per diver. (TR 19). The blocks would be lowered to the diver from the barge to the boat that transported the employees out to the barge. The small boat would be driven out to where the diver was working and the blocks would be lowered from there. (TR 19).

Claimant also stated that his job duties included helping to prepare the barge to be towed into the lake. Claimant said that he would "hook the tugboat up to the barge, tighten it down, [and] finalize a variety of things." (TR 50).

There is no presumption of coverage under the LHWCA. When dealing with a "water based" (as opposed to "land based") LHWCA claim, it must be determined if the claim falls within the criteria of LHWCA coverage, or belongs more properly under the Jones Act. The Jones Act, in pertinent part, reads as follows:

> Any *seaman* who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury ... and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury.... Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

46 U.S.C. § 688 (emphasis added). The Jones Act does not define the term "seaman." The inquiry into seaman status is, of necessity, fact-specific: it will depend on the nature of the vessel,[2] and the employee's precise relation to it. *See Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190 (1952).

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[2] It is essential to classification as a seaman that the individual be the member of the crew of a vessel. The term "vessel" has been defined very broadly. *See* 1 U.S.C. § 3. *See also* 46 U.S.C. § 801. In *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3rd Cir. 1998), a barge similar to the one used by Employer was used to aid in the construction of an artificial reef. In that case, the Circuit Court for the Third Circuit found that the barge was a vessel for the purposes of the Jones Act.

Admiralty jurisdiction and the coverage of the Jones Act depend only on a finding that the injured was "an employee of the vessel, engaged in the course of his employment" at the time of his injury. In order to determine whether an employee is excluded under the LHWCA as a "member of a crew," this term of art must itself be examined. The terms "member of a crew" under the LHWCA and "seaman" under the Jones Act are synonymous. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996) *citing Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). The LHWCA and the Jones Act are, in theory, mutually exclusive, so that a "seaman" under the Jones Act is the same as a "master or member of a crew" of any vessel under the LHWCA. *McDermott International v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991); *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7 (1946); *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied* 484 U.S. 1059 (1988).

In *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172 (1995), the U.S. Supreme Court revised the test for determining whether an employee is a member of a crew (seaman). The test is a refinement of the land-based/sea-based dichotomy of workers noted in *McDermott International Inc. v. Wilander*, 498 U.S. 337 (1991). In order to be a classified as a seaman, the following criteria must be met:

> (1) A worker's duties must contribute to the function of the vessel or to the accomplishment of its mission; and
>
> (2) A seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature.

In *Wilander*, the Court addressed the type of activities that a seaman must perform and held that under the Jones Act, a seaman's job need not be limited to transportation related functions that directly aid in the vessels navigation. The Court determined that, although "it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, ... a seaman must be doing the ship's work." 498 U.S. at 355. The Court concluded that under both the Jones Act and general maritime law "all those with that 'peculiar relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform." *Id.* at 354.

Specifically, the *Wilander* Court stated:

> We believe that the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.... It is not the

> employee's particular job that is determinative, but the employee's connection to a vessel.

Id.

Thus, the Court, in *Chandris*, developed a status-based standard, that although it determines Jones Act coverage without regard to the precise activity in which the worker is engaged at the time of the injury, nevertheless best furthers the Jones Act's remedial goals. As set out above, to qualify as a seaman under the Jones Act (and therefore be excluded under the LHWCA), the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation that is substantial in both duration and nature. 115 S.Ct. at 2172. Thus, the employment connected to a vessel in navigation must be substantial both in terms of the nature of the work done and in terms of duration for there to be seaman status.

"The ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." 115 U.S. at 2191. Most telling with the facts presented by the present claim is the decision of the Circuit Court for the Third Circuit in *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3rd Cir. 1998).[3] In that claim, Foulk, the plaintiff, was employed as a commercial diver hired to aid in the construction of an artificial reef. A work barge was anchored 150 feet offshore and used to install the reef by serving as a dive station for the commercial divers. The dive crew did not sleep on the barge and reported to the barge each morning by a motor launch. Foulk was hired to work for 10 days which was the duration of the project. On his first day of work, Foulk was injured while diving.

The Third Circuit in *Foulk* determined that Foulk qualified as a seaman under the Jones Act. The Court reiterated the two part test laid out in *Chandris*. The Third Circuit stated that the U.S. Supreme Court had made clear that the "total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the ... vessels." *Id. citing Chandris,* 115 S.Ct. at 2190. The Court determined that Foulk met the requirements necessary to be classified as a seaman.

Foulk was found to contribute to the function of the vessel and to the accomplishment of its mission. The Court found that the mission of the barge was to install an artificial reef. Foulk was employed as a diver to aid in the installation of that reef. The Court noted that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* Therefore, Foulk was found to contribute to the function of the vessel and accomplishment of its mission, i.e. installing the artificial reef.

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[3] *Foulk* was heard as an interlocutory appeal on a motion for summary decision that was granted by the district court.

The Court also found that Foulk met the first prong of the second requirement. Foulk's connection to the vessel was found to be substantial in nature. Foulk was necessary to the successful completion of the barge's project. The Court stated "[f]urthermore, the profession of commercial diving is maritime in nature as it cannot be done on land." *Id. citing Wallace v. Oceaneering Int'l,* 727 F.2d 427, 436 (5th Cir. 1984). The Court stated further that "[c]ommercial divers are regularly exposed to the perils of the sea, the protection from which was the purpose of the Jones Act seaman requirement." *Id. citing Chandris,* 115 S.Ct. at 2190. Therefore, the Court found that Foulk's connection to the vessel was substantial in nature.

The Court spent more time analyzing whether Foulk's connection to the vessel was substantial in duration. Foulk had worked only one-half day when he was injured. The Court stated that "under the 'no snapshot' doctrine, articulated in *Chandris,* a court does not evaluate a worker's connection to a vessel or fleet at the moment of injury. Instead, the court must consider his intended relationship, as if he had completed his mission uninjured." *Id. citing Chandris,* 115 S.Ct. at 2187, 2191-92. Therefore, the Court considered Foulk's connection with the barge to be 10 days, the time period of the project, not the one-half day that he had worked.[4]

The Court elaborated that "[i]t is the temporal element and the nature of the activities performed that, taken together, determine seaman status." *Id. citing Chandris,* 115 S.Ct. at 2190-91. The Court found that Foulk had performed the "normal crew service" in aiding in the installation of the artificial reef. The Court concluded that a jury "could reasonably find that an employee's connections to a vessel are substantial in both duration and nature even if the duration contemplated is 10 days." *Id.*

The Benefits Review Board ("Board") has adopted a position in line with the Third Circuit's holding in *Foulk*. In *Hansen v. Caldwell Diving Co.,* ___ BRBS ___, BRB No. 98-1596 (Sept. 7, 1999), the claimant in *Hansen* was a commercial diver for employer and suffered work related injuries while aboard a barge. At the time of the accident, claimant served as a member of a dive team employed to facilitate the barge's mission, which was installing underwater cable. The Board determined that the administrative law judge had correctly determined that claimant's work aboard the barge was substantial in nature and duration even though claimant had neither assisted in the barge's navigation nor lived onboard. Claimant worked on the barge daily for four weeks prior to his accident preparing it for the assignment of installing the underwater cable. Claimant's work was found to be maritime in nature, regularly exposing him to the perils of the sea. The Board also found that claimant's connection to the barge was substantial in duration. Claimant's preparatory work began four weeks prior to his injury, and that the seven weeks necessary to complete the mission was substantial in duration.

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[4] The Court also did not consider the time that Foulk spent at nights onshore.

Additionally, this conclusion is consistent with the applicable law. The U.S. Supreme Court established the following test to determine whether an employee has a substantial connection to a vessel: "for the substantial connection to the vessel must concentrate on whether the employee's duties take him to sea." *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535, 31 BRBS 34 (CRT) (1997).

Claimant is clearly a seaman within the purview of the Jones Act. As such, this court does not have jurisdiction to adjudicate his claim under the LHWCA. In order to be considered a seaman under the Jones Act, claimant must meet the test laid out in *Chandris*. First, claimant's duties must contribute to the function of the vessel or to the accomplishment of its mission. Claimant's actions were clearly contributory to the accomplishment of the vessel's mission The mission of the work platform (barge) was to lay the underwater pipe necessary for the city of Erie's sewer system. Claimant served in two different capacities, but looking at either position, it is clear that he was necessary to accomplishing the mission.

While serving as a deckhand, claimant prepared the pipes that would be placed under the water. Then as a diver tender, claimant was instrumental in not only laying the pipe, but preparing his fellow divers to place the pipe under the water. It is clear that claimant meets the first requirement of *Chandris.*

The second requirement of *Chandris* is two-fold. First, claimant's position must have a connection to the vessel that is substantial in nature. Claimant clearly meets this requirement. Claimant's two different jobs on the work platform were essential to the successful completion of the job. Therefore, claimant had a connection to the vessel that was substantial in nature.

Claimant's position must also be substantial in duration. Claimant was hired for the entire length of the project. Claimant worked approximately one month before being injured. However, had claimant remained healthy, he would have been a part of the project from start to finish. The court must consider claimant's intended relationship, as if claimant had completed his mission uninjured. Therefore, claimant's job was sufficiently substantial in duration to satisfy the durational requirement of *Chandris.*

The only remaining issue regards the fact that claimant was injured on land while working at the copper dam in the course of his employment. This court must look at the nature of claimant's activities taken together. When looking at the Claimant's job requirements, it is clear that he meets the requirements of *Chandris* even though his injury ultimately occurred while claimant was on land.

It is evident from the preceding legal precedent that claimant is not entitled to coverage under the LHWCA and is more properly classified as a seaman under the Jones Act.

ORDER

IT IS HEREBY ORDERED that the claim of Joseph T. Zdunski be DISMISSED for lack of jurisdiction under the Longshore and Harbor Workers' Compensation Act.

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ROBERT J. LESNICK
Administrative Law Judge

RJL/JBM